Supreme Court of the United States

October Term, 1964

No. 52

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,
Plaintiffs-Appellants,

BENJAMIN E. SMITH and BRUCE WALTZER,
Intervenors-Appellants,

against

JAMES H. PFISTER, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, RUSSELL R. WILLIE, individually and as Major of the Louisiana State Police Department, JIMMIE H. DAVIS, individually and as Governor of the State of Louisiana, JACK P. F. GREMILLION, individually and as Attorney General of the State of Louisiana, COLONEL THOMAS D. BURBANK, individually and as Commanding Officer of the Division of Louisiana State Police, and JIM GARRISON, individually and as District Attorney for the Parish of Orleans, State of Louisiana,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

APPELLANTS' RESPONSE TO MOTION TO DISMISS OR AFFIRM

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Supreme Court of the United States

October Term, 1963

No. 941

JAMES A. DOMBROWSKI, *et al.*,
Plaintiffs-Appellants,

BENJAMIN E. SMITH AND BRUCE WALTZER,
Intervenors-Appellants,
against

JAMES H. PFISTER, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

APPELLANTS' RESPONSE TO MOTION TO DISMISS OR AFFIRM

On Friday, May 15th, appellants received a copy of a document entitled "Motion to Dismiss or Affirm and Brief for the Appellee in Opposition". Neither the motion nor the brief indicates on its face on whose behalf it is filed. It is signed by "Jack N. Rogers, Committee Counsel, Joint Legislative Committee on Un-American Activities, State of Louisiana". Previously in this Court, Mr. Rogers filed a motion for enlargement of time on behalf of appellee Pfister. No motion to dismiss or affirm has been filed by the Attorney-General of the State of Louisiana or the

District-Attorney of the Parish of Orleans on behalf of themselves or the other named appellees.*

It is not at all clear for whom Mr. Rogers speaks. The Joint Legislative Committee on Un-American Activities is not a party to this action, nor is it an appellee in this Court. Appellee Pfister, as of May 12th of this year, is no longer a member of the Louisiana Legislature nor the Chairman of the Joint Legislative Committee. As we have previously indicated to this Court in our opposition to motion for enlargement of time, appellee Pfister's interest in this proceeding, which challenges the constitutionality of certain Louisiana statutes, is thus minimal.

Appellants suggest to the Court that this minimal character of Mr. Pfister's interest in the present appeal is relevant in considering the main thrust of his contentions. The essence of his argument is that regardless of any question of federal jurisdiction or federal constitutional law any relief in this Court or any federal court will be futile since the state prosecutions under the challenged statutes "are proceeding, and will be reached for trial in June or July of this year." Rogers' Motion and Brief, p. 6.

It is of some interest that this argument has been made in this Court by a party without any responsibility for the

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* On April 19th, Mr. Gremillion moved this Court on behalf of himself, individually and as Attorney-General, Jimmie H. Davis, individually and as Governor, and Colonel Burbank, individually and as Commanding Officer of the Louisiana State Police, for an extension of time to file a motion to dismiss or affirm until May 25th. Appellants opposed this extension of time. An order was entered extending their time to file until May 10th. On May 7th Mr. Gremillion filed an additional motion to further enlarge appellees' time to file a motion to dismiss or affirm. This motion was denied. No motion to dismiss or affirm was then filed on behalf of either Mr. Gremillion, Mr. Davis or Colonel Burbank. No request for any extension of time or any motion to dismiss or affirm was ever filed by Mr. Garrison as District Attorney of Orleans Parish to appellees' knowledge.

prosecutive enforcement of the challenged laws. In addition to other implications raised by this contention, it simply does not reflect the actual situation in Orleans Parish. There is not the slightest likelihood that these cases will be tried by the state courts in "June or July of this year" or disposed of in the near future, under present timetables. See affidavit of counsel reproduced here as Appendix A.

But the argument is more serious than merely the misstatement of the litigation situation in Orleans Parish. It would disregard totally the impact of the Supremacy Clause. Neither this Court nor the lower federal courts are as helpless as Mr. Rogers assumes. If, as Circuit Judge Wisdom forcefully points out in his dissenting opinion, "this case is a classic example for raising the shield of the Constitution in protection of a citizen's constitutional rights" [Jurisdictional Statement, 19a], then this Court and the lower federal courts surely have ample power to raise that shield.

This power was properly asserted by Judge Wisdom in originally issuing a temporary restraining order in this case. Should it ever appear that the state authorities intend to press the prosecutions to trial *prior* to the opportunity for this Court, or the District Court on remand, to reach the basic issues here involved, both this Court and the lower courts have full and ample power to issue on proper application whatever temporary relief is required to preserve Federal jurisdiction.

The primary responsibility of the Federal courts for the protection of "all wrongful governmental invasion of fundamental rights and freedoms", a responsibility "close to the heart of the American Federal Union" [opinion of Judge Wisdom, Jurisdictional Statement 17a, 18a], cannot be frustrated because of an erroneous refusal to accept that responsibility by a lower federal court. In reviewing and reversing the failure of the majority below to meet

the responsibilities the Constitution and the laws of the United States place upon the federal courts, surely this Court has ample power to protect its own jurisdiction to review these fundamental and basic issues of federal jurisdiction and constitutional law.

The suggestion of Rogers that in some manner the state court proceedings may render futile federal relief misses the total thrust of the question. The state proceedings themselves at any stage, and the laws they are grounded on, are designed to intimidate and deter these appellants and the thousands upon thousands of Negro citizens of Louisiana, who seek equality under the law in that state, from exercising fundamental federal constitutional rights. The immediate and ever constant threat to federally protected rights will continue until the power vested in the federal courts by the Constitution and the laws to protect these basic rights is properly exercised.*

Circuit Judge Wisdom placed the issue sharply in his strong dissent:

> "The distinguishing feature of this case, which the majority chooses to ignore, is the contention that the State, under the guise of combating subversion, is in fact using and abusing its laws to punish the plaintiffs for their advocacy of civil rights for Negroes. It so happens that the plaintiffs contend that the Louisiana Anti-Subversion Law is unconstitutional and, besides, has been superseded by congressional legislation. If those contentions are sound, unquestionably the plaintiffs have a right to relief in the federal court. But the deep thrust of the complaint is the State's abuse of its power as

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*The deterrent impact of these laws and prosecutions is heightened by the provision of Louisiana law, Louisiana Rev. Stat. 15:550, which denies the right of bail pending appeal where sentences imposed are five years' imprisonment or more. The challenged laws provide for penalties of ten years' imprisonment (49a, 51a).

to the plaintiffs. If the evidence on this point should support the plaintiffs, they would be entitled to relief—even if the law were clearly constitutional.

* * *

"If the Louisiana Anti-Subversion Law is invalid on its face or invalid as applied the plaintiffs, they should not be subjected to th ıblic indignity of prosecution, the paralysis of earning ability while their case is pending, and a long, expensive appeal through the state courts to the United States Supreme Court. These are foreseeable and inevitable consequences of unlawful State action of the kind alleged here. Win, lose, or draw in the court of last resort—the individual citizen is a heavy loser when the State abuses its legislative power and criminal processes. The only adequate remedy is for the federal district court to stop the State at the start of its abuse of its governmental power. Whether the State is misusing its power can be determined only after a fair and full hearing. The logical forum for that determination is a federal tribunal.

"This Court has jurisdiction. And as a three-judge Court it was instituted for just such a case. It should face up to the responsibilities incident to jurisdiction and to doing the job it was designed to do * * *." (18a, 19a)

We would urge this Court to determine finally the issues here posed and hold the state statutes unconstitutional upon their face and superseded by federal legislation. No further record below is required for such a determination. Should however, the Court reverse the dismissal of the complaint for further consideration by the District Court, appropriate instructions might be included directing the District Court to issue whatever temporary injunctive relief might be re-

quired to preserve the status quo and the jurisdiction of the Court.

The motion to dismiss or affirm should be denied.

Respectfully submitted,

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Of Counsel:
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APPENDIX A

AFFIDAVIT

STATE OF LOUISIANA }
PARISH OF ORLEANS } SS.:

BEFORE ME, the undersigned authority, duly qualified and commissioned in and for the Parish and State above written, PERSONALLY CAME AND APPEARED: MILTON E. BRENER who, after being first duly sworn, declared that:

I am attorney of record for James A. Dombrowski in the Criminal proceedings against him in the Parish of Orleans involving alleged violation of the Louisiana "Communist Control" and "Subversive Activities" laws.

I have been engaged in the practice of criminal law in the Criminal District Court for the Parish of Orleans since 1956. In addition, I served as Assistant District Attorney for the Parish of Orleans from 1956 to 1958 and again from early 1962 until mid-1963. I am familiar with criminal trial and appellate procedure in this Parish. Trial of the above cases on the merits before early 1965 is highly unlikely, and trial before late 1964 is virtually impossible.

The normal and usual delay between trial before the District Court and the hearing of appeal before the Louisiana State Supreme Court in criminal cases is approximately one year. A two year delay is not unusual and delays of from 3 to 5 years have occurred in lengthy or complex cases.

MILTON E. BRENER.